88-667

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

# In the Supreme Court of the United States

**October Term, 1988**

HARVEY KELLY SIMS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. In a multi-defendant criminal prosecution is a Federal District Court authorized to order each defendant and his counsel to respond under oath as to what each of them knows about who is paying the attorney fees of, not only that defendant's own counsel, but each of the other counsel as well?

2. Where the defendants and their counsel, by sworn declaration, have alleged in a facially valid motion to dismiss the indictment on the grounds of governmental misconduct that government agents had effectively destroyed the attorney client relationship by allegations of collusion and criminality as to the attorneys in the case, can the District Court summarily deny an evidentiary hearing thereon when no response thereto has been filed by the government and the Court assumes the defendant's allegations are true?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Harvey Kelly Sims, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit allowing the denial of an evidentiary hearing on Petitioner's amply supported motion for dismissal of the indictment because of willful and deliberate interference with the defendants' right to counsel when there is no response to said motion, and whether the district court can *sua sponte* issue written interrogatories to all defendants and all counsel requiring each of them to respond as to their knowledge of who paid how much money to every lawyer in the case, thus

converting each defendant and his counsel into a potential witness in a criminal prosecution against each of the other defendants and lawyers in the case.

## OPINION BELOW

The opinion of the Court of Appeals is reported as *United States vs. Sims,* 845 F.2d 1564 (11th Cir. 1988), which appears in Appendix A to this Petition. No written opinion was issued by the District Court for the Southern District of Georgia.

## JURISDICTION

The Court of Appeals opinion in this matter was filed on May 27, 1988. A timely Petition for Rehearing, Appendix C of this Petition, was filed and denied on July 25, 1988. On the 20th day of September, 1988 this Honorable Court granted an extension of time within which to file a Petition for Writ of Certiorari up to and including October 17, 1988.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution appears in Appendix B to this Petition.

## STATEMENT OF THE CASE

In late 1985, prior to the indictment in this case, co-defendants Hurtado, Andrade, Rua, and one Mark Olson, were charged by indictment in Columbus, Georgia with drug trafficking offenses. After pleading guilty to one substantive count each defendant received a ten year sentence, except for Olson who received a twelve year sentence in that case. Two of the DEA agents involved in the Columbus case named Keller and Frye, both during that case and subsequent thereto, began

to make it clear to all of the defendants that the attorneys in that case, two of whom were attorneys in this case, were criminally involved and not acting in the best interests of their clients. Mr. Keller stated that the Columbus case was round one, this instant prosecution was round two and round three would be the indictment of the attorneys involved. This information became a matter of common knowledge to all of the attorneys and defendants in this case. Accordingly, before the trial in this case Petitioner Sims together with co-defendants Hurtado, Rua, Andrade and Strange jointly moved to dismiss the indictment because of governmental misconduct. This motion was supported in every factual aspect thereof by the declarations of John Nuckolls, a member of the Georgia bar and one of the counsel in this case, Richard G. Sherman, an attorney from California, counsel for Petitioner, Petitioner and Mr. Hurtado.

The unopposed sworn declarations and reported testimony under oath filed in support of the defendants' motions for dismissal of the indictment revealed the following:

Prior to the indictment in this case and during Grand Jury proceedings with regard thereto, D.E.A. Agents Keller and Frye were making it very clear to the attorneys and defendants in the instant case that several of the attorneys involved therein were being paid by third parties, were criminally involved in obstruction of justice and not acting in their client's best interests. This became a common matter of discussion between the attorneys and clients, with each other and among themselves, causing a deterioration of the attorney client relationship. (Affidavit of Attorney John Nuckolls, App. Br. pp. 17-19).

The above matters were known to Petitioner, who stated in his unrefuted declaration that this very situation caused him to retain an out of state lawyer. Even so, because of these accusations, the atmosphere in the case was such that the lawyers were concerned with being tape recorded by their clients—in the same manner as the government had caused attorney Hagler to be tape recorded by his client, Mr. Olson. Said actions by the government were destroying the attorney client relationship. (Declaration of Harvey Kelly Sims, App. Br. pp. 19-21). Similar complaints were echoed by another defendant in this case, Antonio Jose Hurtado (Declaration of Antonio Jose Hurtado, App. Br. pp. 21-22).

Finally, Petitioner's own counsel in the Court below alleged in a sworn declaration that the attorney client relationship between counsel (including himself) and defendants (including Petitioner) were damaged beyond repair (Declaration of Richard G. Sherman, App. Br. p. 22).

When the motion for dismissal came on for hearing, it was summarily denied and subpoenas were quashed for several witnesses subpoenaed by the defense. The district court, in its ruling denying Petitioner's motion and requested evidentiary hearing, assumed all averments in the Petitioner's moving papers to be true (App. Br. pp. 23-24).

Petitioner's motion for dismissal was then renewed because of certain interrogatories submitted to the defendants and their counsel to which the district court required responses under oath. The proposed interrogatories to each attorney and defendant, respectively, are set forth as follows:

The interrogatories propounded to each lawyer asked:

"1. Do you have any knowledge of the identity of any person who has paid or will be paying your fee?

"(a) If 'yes,' state the identity of the person(s) who has paid or will be paying your fees, or any part of them.

"(b) Have you discussed the source of your fee in any manner with any other person, including any other attorney representing a defendant in this case?

"2. Do you have knowledge of the identity of any person(s) who has paid or will be paying the fees of any other defense attorney in this case?

"(a) If 'yes,' state the attorney of the defendant(s), the identity of the attorney(s) and the identity of the person(s) who has paid or will be paying the fees or any part of them.

"3. Has there been any comment between you and any other defense attorney in this case disclosing the identity of any person (excluding the named defendant represented by you in this case) who has paid or will be paying any portion of your fee?

The interrogatories propounded to each defendant asked:

"1. Do you have any knowledge about the identity of any person(s) who has paid or will be paying this case?

"(a) If 'yes,' state the identity of the defendant(s), the identity of the attorney(s) and the identity of the person(s) who has paid or

> will be paying any portion of such defendant's attorney fee."

When the court overruled the defendants' objections and forced answers by all counsel and the defendants under oath, it destroyed the joint attorney client relationship because it in effect directed all defendants and all counsel to inform as to each other's potential criminal activity. This decimated the joint and several attorney client privileges (Declaration of Harvey Kelly Sims, App. Br. pp. 27-30).

Again the motion for dismissal was denied without an evidentiary hearing.

In the Petition for Rehearing and Suggestion for Appropriateness of Rehearing En Banc timely filed by Petitioner, Appendix C of this Petition, the attention of the United States Court of Appeals for the Eleventh Circuit was directed to the fact that the primary contentions of Petitioner had not been addressed in the Opinion of the Court (Appendix A), as follows:

1. Petitioner's main point on his objection to the district court's interrogatories regarding attorney's fees was not who paid said fees, but rather, the requirement in said interrogatories that all co-defendants and lawyers be informants against one another and furnish information which could lead to the criminal prosecution of one another.

3. Petitioner's primary contention regarding the motion for dismissal because of governmental misconduct was that he was denied an evidentiary hearing on said motion despite his well documented request therefor and showing of prejudice therein, the lack of a government response thereto and the district court's assumption that all allegations in said motion were true

and correct.

The United States Court of Appeals for the Eleventh Circuit denied said Petition for Rehearing without comment thereon and allowed its Opinion to stand unchanged.

## REASONS FOR GRANTING THE WRIT

The Court should grant certiorari because of the importance of the issues contained herein. While this Court has never dealt directly with the question of whether or not who pays a legal fee and the amount of that fee is a confidential communication protected by the attorney-client privilege, this issue has been dealt with by United States Courts of Appeal across the country. Generally speaking, it has been held that under appropriate circumstances such information is not privileged unless it would be the last link in a chain that would incriminate a client.

There is, however, no case known to the Petitioner which deals with a situation such as that in the case at bar. Here we have a situation in which there are multi-defendants and their individual counsel with a joint defense strategy and cross privileges and the district court *sua sponte* orders each defendant and his counsel to disclose, under oath and over objection, not only their own fee arrangements and who is paying that fee, but that each of them disclose what they know about the source of the funds used to pay all of the other counsel in this case.

The Court of Appeals found there was justification for the district court's inquiry because of what had occurred in a preceding unrelated case involving Mr. Sims and some of the other defendants. In this case, however, it was made clear by both the district court

and United States Attorney that there was no such evidence of misconduct as to the clients and attorneys in this case (Rep. Tr. 12/30/86, pp. 326-331). The district court's inquiry then was prophylactic, i.e. to prevent against future unspecified impropriety in that regard, which is precisely what the Court stated when it said its questions was designed to head off any post-conviction section 2255 motions and for it to properly qualify the jury (Rep. Tr. 12/30/86, p. 345).

There is no reported case known to counsel in which interrogatories, such as those above quoted, have been submitted in a multi-defendant case. It has long been settled that the attorney-client privilege applies to confidential communications among attorneys and their clients for purposes of a common defense. *Eisenberg v. Gagnon,* 766 F.2d 770, 787-88 (3rd Cir.) *cert. denied,* 474 U.S. 946, (1985), *United States v. Melvin,* 650 F.2d 641, 645 (5th Cir. 1981); *United States v. McPartlin,* 595 F.2d 1321, 1327 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965). When the district court required, over objection, sworn responses thereto it destroyed the joint attorney-client privileges in the case and, shortly thereafter, all but two of the defendants entered pleas of guilty to some of the charges against them.

The United States Court of Appeals for the Eleventh Circuit did not discuss the above issue in its Opinion (Appendix A), in spite of the fact that this was the central issue in the appeal before that Court. Our Circuit Courts should be required to deal with issues such as this because our lower Courts and counsel must know to what extent inquiry into these areas is proper or improper. Otherwise situations such as above described might become commonplace.

In resolving this issue, this court needs to address whether there must be a prima facie finding of relevancy to the defendant's trial by the district court before written interrogatories regarding fees can be judicially promulgated to defense counsel and enforced. In requiring attorneys to divulge their fees to the Grand Jury, there appears to be conflict between the circuits. In *In re Special Grand Jury #81-1 (Harvey),* 676 F.2d 1005, vacated on other grounds, 697 F.2d 1112 (4th Cir. 1982) (en banc), the Fourth Circuit held that where the attorney subpoenaed by grand jury is in an ongoing attorney-client relationship with the target of the grand jury, the United States Attorney is required to make a preliminary showing of relevance and need before the attorney can be required to appear. *Id.* at 1011. The First Circuit, under its supervisory powers, approved of the adoption of a local rule requiring prior judicial approval before the issuance of grand jury subpoena on a target's counsel. *United States v. Klubock*, 832 F.2d 649, 654-656 (1st Cir. 1987). Other circuits have refused to adopt the *Harvey* approach in the pre-indictment context. See *In re Grand Jury Proceeding (Schofield),* 721 F.2d 1221, 1223 (9th Cir. 1983) (refused to require a preliminary showing in the pre-indictment setting); *In the Matter of Klein,* 776 F.2d 628, 633 (7th Cir. 1985) (rejecting need for preliminary showing in the pre-indictment context); *In re Grand Jury Proceeding (Weiner),* 724 F.2d 154, 156 (6th Cir. 1985) (same); *In re Grand Jury Proceeding (Freeman),* 708 F.2d 1571, 1575 (11th Cir. 1983) (same). The Ninth and Second Circuits have rejected a *Harvey* showing in the post-indictment context as well. *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1985) (en banc) *cert. denied* 475 U.S. 1108; *United States v. Perry* ___ F.2d ___, #85-1046 (9th Cir. September 22, 1988). Those circuits

refusing to adopt the *Harvey* approach have commonly done so on the grounds that its application would unduly disrupt and hamper Grand Jury proceedings or give traditional deference to the principle that Grand Jury subpoenas should not ordinarily be subject to preliminary review by the courts for relevance and need. See, e.g., *In re Grand Jury Subpoena Served Upon Doe, supra,* 781 F.2d at 248; *In Re Klein, supra,* 776 F.2d at 631; *In re Grand Jury Proceedings (Weiner), supra,* 754 F.2d at 156. The special circumstances surrounding a Grand Jury proceeding, however, are absent from this case. Here, the district court acted as an arm of the prosecution by promulgating the interrogatories on its own motion. There was no prima facie showing that appellant's counsel or his co-counsel had acted improperly. In fact, the district court noted there was no evidence of misconduct in this case (Rep. Tr. 12/30/86, pp. 326-331). Nevertheless, as reflected in the affidavits in support of Petitioner's motion the interrogatories made shambles of a common defense. As the First Circuit in *United States v. Klubock, supra,* 832 F.2d at 653, observed in the context of a Grand Jury subpoena:

> "The serving of a subpoena under such circumstances will immediately drive a chilling wedge between the attorney/witness and his client. This wedge is the natural consequence of several underlying factors created by this anomalous situation. Most obvious is the fact that the client is uncertain at best, and suspicious at worst, that his *legitimate* trust in his attorney may be subject to betrayal. And because the subpoenaed attorney/witness may himself feel intimidated, this may *in fact* take place if there is not even minimal ethical control

> regarding the subpoenaing of an attorney/ witness to seek evidence against his client." [Original Emphasis; Fn. omitted.]

*Klubock* also noted that the service of the subpoena may create an immediate conflict of interest between the attorney/witness and his client since the attorney as a witness has separate legal and practical interests apart from those of his client and those interests may or may not coincide with those of his client. Further, the attorney must devote time and resources to looking after his own interests while at the same time trying to protect those of his client. *Id.* Accordingly, in balancing the attorney-client relationship embodied in the Sixth Amendment against the needs of the district court to head off any post conviction section 2255 motions and properly qualify the jury, this court must require the district court to make a prima facie finding of relevancy before forcing the disclosure of the fee arrangements between an attorney his client. *See* Note, Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing, 20 Ga.L.Rev. 747, 775-780 (1986); Note, A Critical Appraisal of the Justice Department Guidelines For Grand Jury Subpoenas Issued to Defense Attorneys, 1986 Duke.L.J. 145 (1986).

The other important issue in this case is the question of when evidentiary hearings must be granted where motions therefore are supported by competent sworn declarations not controverted by any competent evidence and when the factual averments contained in said motion are assumed by the Court to be true.

This Court, in *Franks v. Delaware* 438 U.S. 154, 171-72 (1978), set forth standards as to the showing required to justify an evidentiary hearing on issues relating to the Fourth Amendment of the United States Consti-

tution. In motion practice the law seems to be that unrefuted offers of proof or affidavits, must be accepted as true when they are not property controverted, *United States v. Kartman,* 417 F.2d 893, 896 fn. 7 (9th Cir. 1969). The showing generally required to entitle defendants to a hearing on a charge of prosecutorial misconduct is that if defendants "raise a material fact which, if resolved in accordance with defendants' contentions, would entitle them to relief, they would be entitled to a hearing." *United States v. Holloway,* 778 F.2d 653, 658 (11th Cir. 1985) *rehearing denied United States v. Hogan,* 785 F.2d 1037 *cert. denied* 106 S.Ct. 2276, *Sullivan v. United States,* 106 S.Ct. 2277 and 106 S.Ct. 3307. *See, United States v. Irwin,* 612 F.2d 1182, 1187 (9th Cir. 1980). Here, the moving papers alleged the facts with "definiteness, clarity and specificity . . ." *United States v. Carrion,* 463 F.2d 704, 706 (9th Cir. 1972). In this case, despite accepting Petitioner's averments as true, the district court denied the motion without an evidentiary hearing thereon. The Court of Appeals then sanctioned this result by ruling that Petitioner had not shown any prejudice which resulted from the government's actions, citing *United States v. Morrisson,* 449 U.S. 361, 365 (1981).

This ruling is difficult to understand in view of the uncontroverted factual allegations in Petitioner's motion that the joint attorney-client privilege had been destroyed because of the mistruct created by the unjustified and unsubstantiated allegations of the government agents that defense counsel were engaging in criminal activities. These allegations were magnified by a former defendant, Olson, who tape recorded his own lawyer at the government's behest. An aura of distrust was created between all defendants and lawyers in this case because of the government's conduct. Yet, the Court denied an

evidentiary hearing and the Court of Appeals upheld this ruling.

Standards for determining when evidentiary hearings should be granted in our criminal courts must be explicitly set forth. In this case Petitioner even surpassed the showing required by *Franks v. Delaware, supra,* but was denied an evidentiary hearing as required by *Franks v. Delaware, supra,* but was denied an evidentiary hearing.

## CONCLUSION

The issue of whether or not a federal district court can, on its own motion, require all defendants and counsel in a multi-defendant criminal prosecution to answer interrogatories under oath as to their knowledge of who was paying the fees of each attorney in the case is before the court in this petition. It is a question which has never been determined by this Honorable Court and is very relevant to issues of the attorney-client privilege and federal criminal procedure.

Another question raised in this petition which is worthy of consideration by this Honorable Court concerns the showing necessary for an evidentiary hearing in motion practice, e.g., motions to dismiss the indictment because of governmental misconduct.

These issues are worthy of consideration by this Honorable Court.

Respectfully submitted,

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*Attorney for Petitioner*
*HARVEY KELLY SIMS*

# APPENDIX

# United States Court of Appeals for the Eleventh Circuit

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>*vs.*<br>HARVEY KELLY SIMS,<br>*Defendant-Appellant.* | 11TH CIR. CASE NO. 87-8216<br>U.S.D.C. NO. CR 486-80 |

## PETITION FOR REHEARING AND SUGGESTION FOR APPROPRIATENESS OF REHEARING EN BANC

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**Appendix A**

**UNITED STATES of America,**
**Plaintiff-Appellee,**
**v.**
**Harvey Kelly SIMS,**
**Defendant-Appellant,**
**No. 87-8216.**

United States Court of Appeals,
Eleventh Circuit.

May 27, 1988.

Defendant was convicted in the United States District Court for the Southern District of Georgia, No. CR486-80, Anthony A. Alaimo, Chief Judge, of drug violations and defendant appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) even if agents' actions violated coconspirator's right to counsel, defendant had no standing to assert claim; (2) District Court's inquiry regarding source of attorney fees in major drug importation conspiracy case was proper and did not violate defendant's Sixth Amendment rights; and (3) even if allegedly false statements were eliminated from affidavit, affidavit was sufficient to support issuance of search warrant.

Affirmed.

**1. Criminal Law ⇐633(1)**

In camera hearing conducted to inform coconspirator of his right to counsel and to obtain district court's approval for coconspirator's direct negotiations with Government, after coconspirator solicited Government's assistance and sought to negotiate with Government for favorable disposition of his case believing that his attorney was not adequately representing him, was proper. U.S.C.A. Const.Amend. 6.

**2. Criminal Law ⇐394.5(2)**

Even if Drug Enforcement Administration agents violated coconspirator's Sixth Amendment rights by negotiating directly with coconspirator and without assistance of coconspirator's counsel, defendant had no standing to assert in his own defense denial of coconspirator's constitutional rights. U.S.C.A. Const.Amend. 6.

**3. Criminal Law ⇐627.5(3)**

Although matters involving receipt of fees from clients are not generally privileged, exception exists where disclosure of fee information would give identity of previously undisclosed client suspect.

**4. Criminal Law ⇐627.5(3), 627.8(3)**

District court's order directing lawyers involved in major drug importation conspiracy case to divulge sources of their fees did not require identity of previously undisclosed client suspect, and was justified by Government's showing of appearance of impropriety and possible conflict of interest; record indicated that lawyers representing codefendants in case also represented codefendants in previous case involving drug conspiracy and that defendant provided fees to all counsel in

previous case even though he was not party in previous case.

**5. Criminal Law ⇐627.8(3)**

Government was not required to establish prima facie showing that information sought was relevant to its investigation in order to be entitled to information concerning sources of lawyers' attorney fees in major drug conspiracy case.

**6. Criminal Law ⇐36.5**

Although federal court possesses authority to dismiss indictment for governmental misconduct, dismissal is extreme sanction which should be infrequently utilized.

**7. Criminal Law ⇐641.12(1)**

District court requiring lawyers in major drug importation conspiracy case to divulge source of their fees did not violate defendant's Sixth Amendment rights; district court made inquiries regarding attorneys fees before trial and none of such claims would have been before jury if defendant had not called coconspirator informer to testify about inquiries. U.S.C.A. Const.Amend. 6.

**8. Judges ⇐49(1)**

District judge's inquiry into source of attorney fees received by attorneys from their clients in major drug importation conspiracy and its conducting of in camera hearing was insufficient to establish prejudice or bias that would warrant district judge's recusal. 28 U.S.C.A. §§ 144, 455.

**9. Criminal Law ⇐394.4(6)**

Even if statements alleged to be false were removed

from warrant affidavits, unchallenged statements of government witness and independent police investigation established probable cause sufficient to support isssuance of search warrant so that evidence seized was admissible in major drug importation conspiracy case.

Appeal from the United States District Court for the Southern District of Georgia.

Before JOHNSON and HATCHETT, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this major drug importation conspiracy case, we affirm the district court's rulings on motions for recusal, dismissal of the indictment, and suppression of evidence.

FACTS

Harvey Kelly Sims, the appellant, operated an elaborate drug smuggling enterprise in south Georgia. The Sims organization successfully imported three aircraft loads of cocaine from Colombia, South America. Sims, a licensed pilot, personally flew the aircraft and imported approximately 2,000 pounds of cocaine. The testimony of the government's key witnesses, Rick Jarriel and Mark Olsen, established that Sims hired ground personnel to assist in preparing aircraft landing strips and in transporting and storing cocaine at designated locations. The organization had a corporate-like command hierarchy. Sims commis-

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

sioned Wayne Strange, a co-defendant, to secure crews for off loading the narcotics. "Dummy" corporations existed in Georgia, Florida, Panama, and Delaware and were used to purchase aircraft and vehicles to assist in the off loading process. State of the art electronic equipment such as sophisticated navigational equipment, landing lights, and night vision goggles were commonplace to this operation. The organization purchased an eighty-acre tract of land in an unpopulated area of Tattnall County, Georgia, for use as a landing strip and purchased property in Candler County, Georgia, to store cocaine prior to distribution.

The organization amassed substantial funds during this enterprise. Wayne Strange testified that he received payments in excess of $140,000 for his assistance in the operation. Rick Jarriel testified to finding $175,000 wrapped in a plastic bag in a pig pen at Wayne Strange's house which the pigs had apparently uprooted. Also, Sims made a cash deposit of $170,000 in a Panamanian bank just prior to his arrest.

## PROCEDURAL HISTORY

A federal grand jury in the Southern District of Georgia indicted Sims, along with others, on a ten-count indictment for violation of federal narcotics laws, pursuant to 21 U.S.C. § 848. The indictment charged: (1) four counts of possession with intent to distribute cocaine; (2) four counts of importation of cocaine; (3) one count of conspiracy to import cocaine; and (4) one count of conspiracy to distribute cocaine. The grand jury also named Sims in a forfeiture count, pursuant to 21 U.S.C § 853. Sims filed pretrial motions to suppress evidence, to dismiss the indictment, and for recusal of the district court judge. The district court denied the motions. The district court also ordered

the lawyers in the case to answer interrogatories regarding payment of attorney's fees. After objecting, Sim's lawyer responded to the interrogatories. Sims then renewed his motions for recusal of the district court judge and dismissal of the indictment. Again, the district court denied the motions.

On January 28, 1987, a jury found Sims guilty on all ten counts of the indictment. On Count I, the district court sentenced Sims to a term of life imprisonment, without parole, under the continuing criminal enterprise statute and fined him $100,000. On Counts II-IX, the district court sentenced Sims to concurrent 40-year terms consecutive to the life term. The district court also imposed a $500,000 fine and held Sim's property forfeited to the government.

The issues before this court are: (1) whether the district court erred in failing to dismiss the indictment; (2) whether the district court erred in denying Sim's motion for recusal; and (3) whether the affidavit filed in support of the search warrant is sufficient.

In order to understand Sims's arguments concerning alleged governmental misconduct, we must analyze the relationship between the government's key witness, Mark Olsen, agents of the Drug Enforcement Administration (DEA), and other co-conspirators. This requires examination of two prior cases involving several of the co-conspirators in this case.

## BACKGROUND

### Middle District of Georgia Case

A grand jury in the Middle District of Georgia charged Mark Olsen, an informant, with importation of cocaine from Colombia, South America. The grand jury also charged co-defendants Andrade, Rua, Hurtado, and DePablos-Soto in this venture. Ed Garland and John Nuckolls, lawyers, represented these defendants in the Middle District of Georgia case and represented them in this case.

On February 2, 1986, Mark Olsen pleaded guilty in the Middle District of Georgia case and received a sentence of twelve years imprisonment. Richard Hagler, a lawyer, represented Olsen in that case. After Olsen's conviction, the government granted Olsen immunity and served upon him a compulsion order to give testimony before a grand jury in Macon, Georgia, concerning this case. Olsen refused to comply, and the district court in the Middle District of Georgia found him in contempt.

### Southern District of Georgia Case

On April 17, 1986, a federal grand jury in the Southern District of Georgia indicted Olsen on a seven-count indictment charging possession of false identification and illegal use of a communication facility. The indictment charged that Olsen used false birth certificates and false aircraft pilot's licenses during his participation in offenses charged in this case. As in the Middle District of Georgia case, Richard Hagler represented Olsen.

### The Conference

Olsen's involvement in drug importation enterprises prompted a meeting in the United States Attorney's Office in Macon, Georgia, on May 14, 1986. Hagler represented Olsen and discussed conditions under which Olsen would become a cooperating informant and supply information concerning cocaine importation into middle and southern Georgia. The parties were unable to reach an agreement.

### The Trip

Drug enforcement agents Keller and Frye transported Olsen from Savannah to the Macon meeting. In route to Macon, the agents detoured, taking Olsen to locations in Southern Georgia where the agents believed the organization had cocaine storage sites prior to Olsen's arrest in August, 1985. The agents' intent was to show Olsen the locations in order to convince him of how much the agents knew of the operation so that Olsen would cooperate with their investigations. At this point, a dispute exists as to whether the agents offered to Olsen a recommendation that the court impose a sentence of six years. Olsen contends that the agents stated they would recommend such a sentence. The agents denied making the promise.

### Letters

On July 16, 1986, Olsen entered a guilty plea to the false indentification charge in the Southern District of Georgia. While awaiting sentencing, Olsen wrote numerous letters to federal agencies, including the Drug Enforcement Administration, indicating that he wanted to cooperate with the government. Olsen had become disillusioned with his lawyer (Hagler) because of the lawyer's failure to reach an agreement with the

government. As a result of the letter Olsen sent to their agency, drug enforcement agents Frye and Keller visited Olsen on two occasions without his lawyer's knowlege. At these meetings, the agents told Olsen that his lawyer was not working in his best interest, and Olsen stated his concern about his lawyer's real intent.

When asked about the basis for his concern, Olsen stated that after his arrest in the Middle District of Georgia, Lance Smith, a lawyer, told him that Sims would provide a lawyer for him. Smith also advised Olsen that Sims would take care of all attorney's fees and assist in any way possible. Smith informed Olsen that he had arranged for Hagler to represent him, and that Sims paid substantial sums of money to Hagler, in addition to what Olsen's parents were paying for his representation. Smith assured Olsen that Sims would provide financial support if he were sentenced to a term of imprisonment. Smith also advised Olsen about the case status of Gary Scott and the Mock brothers. Although Sims was not indicted in the Scott case, all of the government's discovery materials given to Scott's lawyer were seized at Sims's Miami residence. Moreover, evidence seized at Wayne Strange's house, a co-defendant in this case, revealed that a series of payments had been made for all lawyers in the Middle District of Georgia case, totaling $300,000. The lawyers listed as receiving payments were Hagler, Smith, Brogdon, and Garland. These lawyers had been associated with co-defendants in Sims's present case as well as the Middle District of Georgia case.

*In Camera*

As stated earlier, Olsen told the DEA agents that he wished to negotiate with the government directly

and without assistance from his lawyer, Hagler. To accomplish this, the government agents brought Olsen before the district court for an *in camera* proceeding without the knowledge of Hagler. The purpose of the hearing was to advise Olsen regarding his right to counsel and to obtain the court's approval for Olsen to personally negotiate with the government. Olsen confirmed his concern to the district court that Hagler was not adequately representing him. After the meeting, the government agents advised Olsen not to discuss the *in camera* meeting with Hagler.

On August 21, 1986, Olsen entered into a cooperation agreement with the government. As part of the agreement, the government asked Olsen to investigate the lawyers in the Columbus case (M.D.Ga.) regarding a possible obstruction of justice scheme. This information became a matter of common knowledge to all of the lawyers and the defendants in this case.

On December 9, 1986, the district court directed the lawyers in this case to divulge the sources of their fees. The court stated that this fee information was necessary in order to properly qualify the jury and to alleviate any possible conflicts of interest. To this directive, the lawyer for Sims, Sherman, and another lawyer, Garland, vehemently objected to divulging the information Sims's lawyer also alleges that he suffered physical intimidation from a deputy of the United States Marshal's Office when he approached the court in reference to the fee information directive. Sims filed motions to dismiss the indictment and moved for recusal of the district court judge in this case because of the *in camera* proceeding. The district court, denied Sims's motions. Numerous affidavits were filed expressing breach of the attorney-client relationship among the various defendants and lawyers in this case.

## DISCUSSION

Sims asserts a sixth amendment violation because of the government's alleged improper contact with co-conspirator Olsen. The district court held for the government finding that any "alleged governmental misconduct arising from activities which may have abridged Mark Olsen's rights do not justify dismissal of the indictment against other defendants."

**[1]** After his Columbus conviction, Olsen became disillusioned with his lawyer's representation and gave the government information used to convict Sims. The purpose of the *in camera* hearing was to inform Olsen of his right to counsel and obtain the court's approval for Olsen's direct negotiations with the government. We find no error in this process. Indeed, Olsen solicited the government's assistance and sought to negotiate with the government for a favorable disposition of his case. This is not the manner in which the government usually handles informants and conducts court proceedings; but, with the increase in lawyer participation in unusual arrangements with clients in drug cases, unusual proceedings and remedies are appropriate.

**[2]** Even if the agents' actions violated Olsen's right to counsel, Sims has no standing to assert this claim. This circuit has held that defendants do not have standing to assert in their own defense the denial of constitutional rights to others. *Wilcox v. Ford,* 813 F.2d 1140, 1148 n. 13 (11th Cir.), *cert. denied,* ___ U.S. ___, 108 S.Ct. 287, 98 L.Ed.2d 247 (1987); *United States v. Fredericks,* 586 F.2d 470, 480 (5th Cir. 1978), *cert. denied,* 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979); *see also Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Sims

cannot benefit from alleged constitutional violations personal to Olsen.

Attorney's Fees

[3] Sims also contends that the district court's inquiry regarding attorney's fees violated his sixth amendment rights. This circuit has consistently held that matters involving the receipt of fees from a client are not generally privileged. *In re Grand Jury Investigation, Harvey,* 769 F.2d 1485 (11th Cir.1985); *In re Slaughter,* 694 F.2d 1258, 1260 (11th Cir.1982); *In re Grand Jury Proceedings: United States v. Jones,* 517 F.2d 666 (5th Cir.1975). An exception to this general rule exists where the disclosure of fee information would give the identity of a previously undisclosed client/suspect. *In re Grand Jury Investigation, Harvey,* 769 F.2d at 1487; *In re Grand Jury Subpoena, Slaughter,* 694 F.2d at 1260. This case does not fall within the exception. We note that the lawyer's responses to the district court's directive did not require the identity of a previously undisclosed client/suspect. Indeed, the government knew the identities of the lawyers and clients. "The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purposes of securing legal advice, and will not be violated by disclosure in this case." *In re Slaughter,* 694 F.2d at 1260.

The government presented probative evidence to the district court regarding payment of attorney's fees which indicated possibilities of collusion and conflicts of interest. At the hearing, Olsen testified about the conversation with Smith during which he was told that Sims would pay all his attorney's fees, that Smith had arranged for Hagler to represent him, and that Sims provided substantial compensation for the represen-

tation. Further, the evidence indicated that Sims possessed discovery materials in his Miami residence with reference to prior cases in the Southern District of Georgia involving Scott, and the Mock brothers. Although Sims was not indicted in the Scott case, Sims was privy to discovery information released to Scott's lawyer. Scott, a co-conspirator in this case, and the Mock brothers were participants in Sims's drug-related activities. Moreover, agents seized notes ~~at~~ co-conspirator Wayne Strange's house indicating a series of payments made through Strange for all lawyers in the Middle District of Georgia case totalling $300,000. These lawyers were associated with co-conspirators in this case as well as the Middle District of Georgia case. Before issuing its directive, the district court was cognizant of the fact that Smith and Brogdon represented Gary Scott and the Mock brothers in the Southern District of Georgia case and that discovery information provided them had been seized in Sims's Miami residence. Given these circumstances, the district court was justified in inquiring as to the source of attorney's fees.

**[4]** We reject Sims's assertion that the government must establish a *prima facie* showing that the information sought is relevant to its investigation. This court has consistently held that "no such showing of relevance is required in this circuit." *See In re Slaughter,* 694 F.2d at 1260; *In re Grand Jury Investigation (Patricia McLean),* 565 F.2d 318 (5th Cir.1977). The government's showing in this case is adequate. The record clearly indicates that lawyers representing co-defendants in this case also represented defendants in a previous case and that Sims provided fees to all counsel in the previous case even though he was not a party in the previous case. The appearance

of impropriety and possible conflicts of interest are pervasive in this case, thereby warranting the district court to inquire as to the source of attorney's fees.

**[5]** Moreover, Sims's alleged sixth amendment violation does not warrant dismissal of the indictment absent a showing of demonstrable prejudice. *See United States v. Morrison,* 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981); *United States v. Melvin,* 650 F.2d 641 (5th Cir. Unit B 1981).[1] Although federal courts possess the authority to dismiss an indictment for governmental misconduct, dismissal is an "extreme sanction which should be infrequently utilized." *United States v. Pabian,* 704 F.2d 1533, 1536 (11th Cir.1983) (quoting *U.S. v. Owen,* 580 F.2d 365, 367 (9th Cir.1978). Dismissal is only favored in the most egregious cases. "Cases involving sixth amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison,* 449 U.S. at 364, 101 S.Ct. at 667-668.

**[6]** In this case, Sims has failed to support his motion for dismissal of the indictment under the *Morrison* standard. We find no prejudice or injury to Sims. We note that the government did not call Mark Olsen at trial to give testimony against Sims. On the contrary, Sims called Olsen to elicit testimony concerning Olsen's contact with the government in an effort to convey possible governmental misconduct to the jury. In essence, Sims intended to benefit from any constitu-

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[1] In *Stein v. Reynolds Securities, Inc.* 667 F.2d 33, 34 (11th Cir.1982), this court adopted as precedent all Unit B decisions of the former Fifth Circuit.

tional claim Olsen may be been entitled to. As stated earlier, defendants do not have standing to assert in their own defense the denial of constitutional rights to others. *Wilcox,* 813 F.2d at 1148 n. 13; *Fredericks,* 586 F.2d 470 (5th Cir.1978). Also, Sims's contention that prejudice resulted from investigations and inquiries concerning the source of attorney's fees is without merit. The court made inquiries regarding attorney's fees before trial. None of these claims would have been before the jury if Sims had not called Olsen to testify about them. Likewise, we find no prejudice from Sims's allegations of U.S. Marshal intimidation during the hearing. Again, no physical contact occurred, and the jury was not present during this confrontation. Thus, the district court correctly denied Sims's motion to dismiss.

Recusal

**[7]** Sims also contends that because the district judge inquired into attorney's fees and conducted the *in camera* hearing, these activities established sufficient prejudice or bias to warrant the district judge's recusal. In *United States v. Meester,* 762 F.2d 867 (11th Cir.), *cert. denied,* 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985), the district court denied Meester's motion to dismiss because of alleged bias and lack of impartiality. This court held that an allegation of bias sufficient to require recusal must demonstrate that the alleged bias is personal as opposed to judicial in nature. "The alleged bias 'must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' " *Meester,* 762 F.2d at 884 (quoting *United States v. Clark,* 605 F.2d 939, 942 (5th Cir.1979) (per curiam)). "An exception to the

general rule that the bias must stem from an extrajudicial source exists where 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.' " *Meester,* 762 F.2d at 867 (quoting *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1051 (5th Cir.1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Recusal is predicated on two statutes which govern federal district judges on the grounds of bias, prejudice, or lack of impartiality. 28 U.S.C. §§ 144, 455.[2]

In this case, Sims has failed to demonstrate the requisite personal bias. The district court judge learned of the questions concerning attorney's fees in his judicial capacity. The district court judge's directive concerning the source of attorney's fees and the conducting of the *in camera* hearing were of a judicial, rather than a personal, nature. The intent of these proceedings was to discover possible conflicts of interest, advise Olsen of his right to counsel, and to properly instruct the jury. The record is replete with circumstances justifying the

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[2]Title 28 U.S.C. § 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein. . . .

Title 28 U.S.C. § 455 provides, in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party. . . .

district court's denial of recusal.

Search Warrant

[8] In this case, Sims asserts that the agents made deliberate false statements to the court in order to secure a search warrant. We hold that the affidavit in support of the search warrant is sufficient. In *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court addressed the issue of whether "a defendant in a criminal proceeding ever [has] the right under the Fourth and Fourteenth Amendments . . . to challenge the truthfulness of factual statements made in an affidavit supporting [a] warrant." *Franks,* 438 U.S. at 155, 98 S.Ct. at 2676. The Supreme Court held that where a defendant makes a preliminary showing that: (1) an affiant knowingly and intentionally included a false statement in an affidavit, or (2) made the false statement with reckless disregard for its truth, and (3) the false statement was necessary to the finding of probable cause, then constitutional mandate requires that a hearing be held at the defendant's request. *Franks,* 438 U.S. at 171-72, 98 S.Ct. at 2684-2685. *See United States v. Haimowitz,* 706 F.2d 1549, 1556 n. 2 (11th Cir.1983), *cert. denied,* 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984); *United States v. Astroff,* 578 F.2d 133 (5th Cir.1978) (in banc).[3] "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine." *Franks,* 438 U.S. at 171, 98 S.Ct. at 2684.

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[3]In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (in banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

**[9]** Even if this Court were to eliminate statements alleged to be false, Sims has failed to satisfy the third prong of *Franks* because sufficient allegations in the warrant affidavits remain to support a finding of probable cause. *See Franks,* 438 U.S. at 171-72, 98 S.Ct. at 2684-2685. The affidavit contains information concerning Sims's smuggling operation and is based on first-hand information provided by the government's key witnesses. The affidavit contains information indicating Sims's direct involvement in the scheme. Independent police investigation verified telephone calls between Sims and other members of the conspiracy, thereby corroborating Rick Jarriel's testimony. Jarriel had direct involvement in the scheme and implicated Sims in the cocaine smuggling operation. Investigation also revealed Sim's use of aircraft and landing equipment to facilitate narcotics importation. The unchallenged statements of Jarriel and the independent police investigation clearly establish a finding of probable cause under the third prong in *Franks*. "Insignificant and immaterial misrepresentations or omissions will not invalidate a warrant." *U.S. v. Ofshe,* 817 F.2d 1508, 1513 (11th Cir.), *cert. denied,* ___ U.S. ___, 108 S.Ct. 451, 98 L.Ed.2d 391 (1987) (citing *Franks,* 438 U.S. at 165, 98 S.Ct. at 2681). We find that the issuing judge "had a substantial bias for . . . concluding that probable cause existed." *See Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1982). Sims's attempt to question the sufficiency of the warrant and the denial of his request for an evidentiary hearing lacks merit.

Accordingly, the district court's convictions and judgments are affirmed.

AFFIRMED.

## AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

# United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
*vs.*
HARVEY KELLY SIMS,
*Defendant-Appellant.*

11TH CIR. CASE NO. 87-8216
U.S.D.C. NO. CR 486-80

## PETITION FOR REHEARING AND SUGGESTION FOR APPROPRIATENESS OF REHEARING EN BANC

TO THE HONORABLE JUDGES JOHNSON AND HATCHETT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ESCHBACK, SENIOR UNITED STATES CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT, SITTING BY DESIGNATION:

COMES NOW the defendant and appellant herein,

Harvey Kelly Sims, by and through his attorney of record, Richard G. Sherman, and respectfully petitions this Honorable Court to grant a rehearing in the case at bench. Alternatively, it is respectfully suggested that the issues raised herein are appropriate for determination by the United States Court of Appeals for the Eleventh Circuit sitting en banc.

The Opinion of the Court, filed May 27, 1988, is attached hereto as Exhibit "A". This petition is due to be filed on or before June 16, 1988. This petition and its filing are permitted pursuant to Rule 40 of the Federal Rules of Appellate procedure. The statement of counsel and the body of the Petition are set forth in the attached Memorandum of Points and Authorities.

DATED: June 14, 1988

Respectfully submitted,

RICHARD G. SHERMAN,

*Attorney for Defendant-Appellant*

*HARVEY KELLY SIMS*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I

### INTRODUCTION
### STATEMENT OF COUNSEL

For the reasons set forth more fully herein, it is counsel's considered judgment that the present petition is appropriate to direct the attention of this Honorable Court to:

1. The appellant's contention regarding the motion for dismissal because of governmental misconduct was that he was denied an evidentiary hearing on said motion despite his well documented request therefor.

2. The appellant's main point on his objection to the Court's interrogatories regarding attorney's fees was not who paid said fees, but rather, the requirement in said interrogatories that all co-defendants and lawyers be informants against one another and furnish information which could lead to the criminal prosecution of one another.

As well be explained below the Opinion of this Honorable Court did not deal with the primary issues addressed by the appellant herein. The appellant recognizes that he may not have properly articulated said issues in this brief and apologizes therefor to this Honorable Court. Such deficiency will be remedied herein.

II

**THE DECISION HEREIN OVERLOOKS THE APPELLANT'S PRIMARY ARGUMENT THAT HIS MOTION FOR DISMISSAL OF THE INDICTMENT AND REQUEST FOR AN EVIDENTIARY HEARING THEREON WAS DENIED WITHOUT GRANTING SAID EVIDENTIARY HEARING IN SPITE OF SIGNIFICANT EVIDENCE IN SUPPORT OF THE REQUEST THEREFOR.**

The unopposed sworn declarations and reported testimony under oath filed in support of the appellant's motions for dismissal of the indictment revealed the following:

A. Prior to the indictment in this case and during Grand Jury proceedings with regard thereto, D.E.A. Agents Keller and Frye were making it very clear to the attorneys and defendants in the instant case that several of the attorneys involved therein were being paid by third parties, criminally involved with obstruction of justice and not acting in their client's best interests. This became a common matter of discussion between the attorneys and clients, with each other and among themselves in this case and it was causing a deterioration of the attorney client relationship. (Affidavit of Attorney John Nuckolls, App. Br. pp. 17-19).

B. The above matters were known to the appellant, Sims, who stated in his unrefuted declaration that this very situation caused him to retain an out of state lawyer. Even so, the atmosphere in the case was such, because of these accusations that the lawyers were concerned with being tape recorded by their clients in the same manner as the government had caused attorney Hagle to be tape recorded by his client, Mr. Olsen. Said actions

by the government were destroying the attorney client relationship. (Declaration of Harvey Kelly Sims, App. Br. pp. 19-21). Similar complaints were echoed by another defendant in this case, Antonio Jose Hurtado (Declaration of Antonio Jose Hurtado, App. Br. pp. 21-22).

Finally, appellant's own counsel in the Court below alleged in a sworn declaration that the attorney client relationship between all counsel (including himself) and defendants (including appellant) were damaged beyond repair (Declaration of Richard G. Sherman, App. Br. p. 22).

When the motion for dismissal came on for hearing it was summarily denied and subpoenas were quashed for several witnesses subpoenaed by the defense. The Court, in its ruling denying the defendant's motion and requested evidentiary hearing assumed all averments in the defendant's moving papers to be true (App. Br. pp. 23-24).

The defendant's motion for dismissal was renewed because of certain interrogatories submitted to the defendants and their counsel to which the Court required responses under oath. This issue was dealt with factually in the Appellant's Opening Brief at pp. 24-30 thereof. For the purpose of this Court's convenience the proposed interrogatories will be set forth as follows:

> "1. Do you have any knowledge of the identity of any person who has paid or will be paying your fee?
>
> "(a) If 'yes,' state the identity of the person(s) who has paid or will be paying your fees, or any part of them.
>
> "(b) Have you discussed the source of your

fee in any manner with any other person, including any other attorney representing a defendant in this case?

"2. Do you have knowledge of the identity of any person(s) who has paid or will be paying the fees of any other defense attorney in this case?

"(a) If 'yes,' state the identity of the defendant(s), the identity of the attorney(s) and the identity of the person(s) who has paid or will be paying the fees or any part of them.

"3. Has there been any comment between you and any other defense attorney in this case disclosing the identity of any person (excluding the named defendant represented by you in this case) who has paid or will be paying any portion of your fee?

"The interrogatories propounded to defendant asked:

"1. Do you have any knowledge about the identity of any person(s) who has paid or will be paying any part of the attorney fees of any other defendant in this case?

"(a) If 'yes,' state the identity of the defendant(s), the identity of the attorney(s) and the identity of the person(s) who has paid or will be paying any portion of such defendant's attorney fee."

When the Court overruled the defendants' objection and forced answers by counsel and the defendants under oath, it destroyed the attorney client relationship because it in effect directed all defendants and all counsel to inform as to each other's potential activity. This

decimated the joint and several attorney client privileges (unrefuted Declaration of Harvey Kelly Sims, App. Br. pp. 27-30).

Again the motion for dismissal was denied without an evidentiary hearing.

It is difficult to imagine a situation in which a defendant's Constitutional right to counsel has been more seriously damaged. The defendant-appellant in the Court below submitted unrefuted declarations which set forth that government agents and attorneys were destroying the attorney client relationship by telling both the attorneys and their clients that the attorneys were engaging in criminal conduct and not acting in their client's best interests. This situation was aggravated by the Court, who required, in this aura of mistrust generated by the government, that each lawyer and client inform on the other.

Surely a hearing should have been granted on these allegations. The denial of the right to counsel by the deliberate activities of the Court and government agents warrants an evidentiary hearing if not an outright dismissal.

## III

## SUGGESTION FOR APPROPRIATENESS OF REHEARING EN BANC

The issues here are vital and significant. Where an appellant has claimed the government and court's deliberate actions have destroyed his right to counsel and made an adequate factual showing thereof, he is at least entitled to an evidentiary hearing on such allegations. This Court has not, in its Opinions, dealt with these specific contentions of the appellant.

It is an issue which is worthy of consideration by

this Honorable Court sitting en banc.

**CONCLUSION**

For all of the reasons set forth above it is respectfully submitted that the Petition for Rehearing be granted, or, in the alternative, that the matter be determined by the Court of Appeals sitting en banc.

DATED: June 14, 1988

Respectfully submitted,

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RICHARD G. SHERMAN,
*Attorney for Defendant-Appellant*
*HARVEY KELLY SIMS*

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 17, 1988, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
*(Original and forty copies)*

Solicitor General
Department of Justice
Washington, D.C. 20530

The Honorable Anthony
A. Alaimo
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Office of the U.S. Attorney,
William H. McAbee, II,
Asst. U.S. Attorney
P.O. Box 8999
Savannah, Georgia 31412

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 17, 1988, at Los Angeles, California.

Betty J. Malloy
*(Original signed)*